IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

SATURDAY, THE 1ST DECEMBER 2007 / 10TH AGRAHAYANA 1929

CRL.A.No. 2107 of 2004()

SC.46/2002 of SESSIONS COURT, THALASSERY
.....

APPELLANT/ ACCUSED (IN JAIL):

PATTARVAYAL KANAKAN, S/O.NANU,
AGED 38, CARPENTER, CHOKLI AMSOM, MANAPRAM.

BY ADV. SRI.K.S.MADHUSOODANAN
SRI.K.VISWAN
SRI.T.N.SURESH
SRI.B.R.VIJAYAMOHAN
SRI.K.B.SUJAIKUMAR
SRI.T.V.JAYAKUMAR

RESPONDENT/COMPLAINANT & FORMAL PARTY:

STATE OF KERALA TO BE REP. BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.NOBLE MATHEW

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.HEMA, JJ.

CRL.A.NO.2107 OF 2004 ()

Dated this the 1st day of December, 2007

J U D G M E N T

KOSHY,J.

One Purushothaman @ Purushu, aged 40 years, a bus conductor by occupation and a BJP activist was murdered on 1.11.1998, allegedly due to political rivalry by a group of persons (CPI(M) activists). Seven persons were charge sheeted. Accused No.3 died and six accused faced trial for the offences punishable under Sections 143, 147, 148 and 302 read with Section 149 of the Indian Penal Code. A2 and A4 to A7 were acquitted. First accused alone was found guilty for the offence charged and he filed this appeal.

2. The case of the prosecution was that, PW3, a neighbour informed deceased Purushu on 1.11.1998 at about 9 p.m that there was a telephone call from his wife's house and within 15 minutes he would again be called. To attend the same, by about 9.15 p.m., after taking the shirt in his hand he

went to the house of PW3. He was followed by his sister PW1. She, while stepping down to the pathway from the house compound heard the sound of a whistle and saw the assailants rushing towards him from all sides. Smelting danger, deceased ran to the house of CW13. By the time he reached near the northern side of the kitchen/bathroom of CW13, the assailants surrounded him and A1 inflicted a heavy blow on the head with a pestle (MO1). The victim fell down. Thereafter other accused attacked him with iron rods, axe, knife, chopper etc. By the time, his wife, brother PW2, uncle CW5 etc. reached the spot and accused ran away with weapons except the pestle which was thrown near the place of occurrence. The torn shirt of the victim MO8 was found there sealed with blood. PW2 rushed to Chokli Police station to arrange a vehicle to take the injured to the hospital as it was a bandh day consequent to the murder of one Jaykrishnan master (BJP worker) on the previous day. PW1 and CW5 also rushed for finding out a vehicle. No vehicle was found nearby and they went to the Chokli Police Station and requested the police constable there for arranging a vehicle. But there was no vehicle. Finally PW8 as informed by PW11, Assistant Sub Inspector went to the place of occurrence by an

auto and deceased was taken to the Pallur Government Hospital with PW1 etc. From Pallur Hospital, on the advise of the doctor he was taken to the Thalassery Government Hospital where he was declared dead. From Pallur Government Hospital. PW1 returned and gave F.I.Statement at 11.15 p.m. On the basis of the same, case was registered under Sections 143, 147, 148 and 307 read with Section 149 of IPC. After investigation, suit final report was filed, charge sheeted A1 to A7 for the offences punishable under Sections 143, 147, 148 and 302 read with Section 149 of IPC.

3. PW1 is the sister of the deceased. She was living in the family house during that time along with her mother, brothers (deceased, CW6 & PW2), their uncle, her father's sister, their son etc. At the relevant time, she was unmarried. She deposed in terms of the prosecution case. She deposed that as on 9 p.m. on 1.11.1998, CW16 came near their house and informed with regard to the telephone call from wife's house of Purushu and also informed that the person who made the telephone call wants to talk with Purushu and he will telephone after 15 minutes. Therefore Purushu left the place

within 15 minutes taking a shirt in his hand and a torch. She accompanied him upto the stairs. She came down and by walking about $6^{1}/_{2}$ metres, she heard a whistle. She saw about ten persons rushing towards the deceased. She cried aloud and ran towards the deceased. CWs.5, 6, 9, 11 etc. also came. By the time he ran towards the house of CW13. He rushed to the kitchen side of CW13. A1 beat him from behind and he fell down. By the time other accused inflicted injuries on him with sword, knife, iron rods etc. She identified MO1 pestle used by A1. She also deposed that A2 inflicted injuries with sword (MO2). She also identified A1 to A5 and A7 in the court as the persons who were there in the group inflicting injuries. She also identified some of the weapons used by other accused. She also identified CWs.5, 6, 9 etc. who took the injured in front of K.G.Stores. CW6 went for getting a vehicle. Not seeing him bringing the vehicle, she along with CW5 went to get a vehicle. Since they were not able to get a vehicle, they went to Chokli Police Station and ask a constable present there to get a vehicle as her brother was inflicted with fatal injuries. There was no vehicle in the Police station. Then she returned to the place where injured was lying. By the time a police constable

came with an auto and he was taken to Pallur Government Hospital. CW6 got a jeep and came to Government Hospital. They were asked by the doctor of Government Hospital, Pallur to take him urgently to Government Hospital, Thalassery for better treatment. CW6 took him to Government Hospital, Thalassery. She came back to her house in the autorickshaw along with the police. Later a Police officer came to her house and she described the incident to him. She was asked to come to police station and Ext.P1 F.I.Statement was given. According to her, she gave all necessary information in Ext.P1. She also stated that she gave names of A1 to A5 to the police officer but he stated that at present it is enough to record the name of one accused. Police took her back to her house. She identified the torch, chappal and dress of the deceased. She also stated that when she reached near the injured, one of the accused pushed down and she fell down. CW11 was also pushed down. She was pregnant at that time and it was aborted.

4. She gave the F.I.Statement soon after the incident and before she came to know about the death of her brother. It is

true that she was shocked and there is fear also in her mind and it was a brutal planned attack. She also stated that there is light from the house and house of CW10. The F.I.Statement reached the court in the next day morning. PW10 recorded the F.I.Statement. There was a tense situation in the place and frequent clash was there on between B.J.P. workers and C.P.M. workers. C.P.M. was ruling during the relevant time and there were many political murders during the relevant time in the area. In fact it was also on a bandh day, incident happened in protest against the murder of one Jayakrishnan master, a B.J.P. worker in the class room while he was taking class. There was a murder of Marxist leader also subsequently. There is an allegation that F.I.Statement was concocted. F.I.Statement was received immediately and it was dispatched in the early morning of next day, despite police was very busy in controlling the situation in the area. There is no material to disbelieve the deposition of PW1. There is no material contradictions from the F.I.Statement in the deposition even though she was cross examined on each and every aspect. In Ext.P1, the name of A1 (as Pattarvayal Kanakan) was only mentioned. It has come in evidence that the house of A1 is close to the house of the

deceased. This is conceded by A1 also when questioned under Section 313 Cr.P.C. PW1 claimed that she had acquaintance with all the accused and revealed all the names to the police but only recorded the name of A1. He identified all of them in the dock. Herself, A1 and others in their childhood, used to play together. There is nothing to suspect Ext.P1 which was given by PW1 within two hours of the incident. In that statement (Ext.P1), PW1 specifically identified A1 also as one of the assailants. Therefore, there is sufficient assurance for the identification of A1 made by PW1.

5. PW2 is the brother of the deceased. He also corroborated the evidence of PW1 and derived the information regarding the incident as narrated by PW1. He came to the place of incident hearing the cry of PW1. He also identified A1 and MO1 pestle used by him. He also identified A2 and MO2 used by the accused. He identified A4 to A7 also and identified weapons used by them. He also stated that after taking the injured in front of K.G.Stores he went in search of vehicle. He was not able to get a vehicle and he got a lift in a

scooter and he went to Chokli Police Station and they expressed their inability to produce a vehicle. Then he went to Pallur and took the jeep. By the time he came near K.G.Stores, injured was taken to Pallur Hospital and he was taken in the jeep to Government Hospital and admitted by the doctor and doctor declared him dead. He deposed that eventhough his brother is an activist of the local BJP Union, he has no politics. On the day in question at 7 to 7.30 p.m. there was a rally of Marxist party workers. When it passed near their house, they made the slogan “

”. His evidence completely corroborates the evidence of PW1. PW3 is the neighbour of the deceased. She deposed that at 9 p.m. she received a telephone call. The caller claimed that he is related to the wife of the deceased. The caller wanted to talk to the deceased and since PW3 informed him that there was no body there to convey the information to the deceased, the caller told her that he would again call after about 15 minutes. Accordingly, PW3 instructed CW16, her employee, who had by then came to the house to convey the information to the deceased. CW16 went to the house of the deceased and

conveyed the information. After sometime, PW3 heard hue and cry from towards the scene of occurrence. Later, she learnt that the deceased suffered injuries and was taken to the hospital. The next day, she learnt the death. Evidence of PW3 also corroborates the evidence of PWs.1 and 2 and explained how deceased was entitled to go out of the house between 9 and 9.15 p.m. and also stated that attack was well planned. PW4 is the attestor to Ext.P2 scene mahazar. PW5 is the witness to Ext.P3 seizure mahazar. PW8 is a police constable who on the instruction of ASI took the bleeding injured along with two persons to Thalassery Hospital in an autorickshaw. He and his relatives were eager to save the life of the injured. He also deposed that people gathered there told that deceased was attacked by a group of people. Since he hurriedly took the bleeding injured to hospital, instead of collecting details of the incident, he had only cryptic information and he did not give an F.I.S. It has also come out in evidence that by the time he went to the police station. PW2 also returned from Pallur Hospital and gave F.I.Statement.

6. PW9 is the doctor who conducted post mortem

examination. He noted the following ante mortem injuries:

INJURIES:

1. Incised wound 5 x 2 cm scalp deep, left parietal region.

2. Incised wound below the Rt. Submandibular region extending horizontally from midline to the posterior auricular region 13 cm x 5 cm x 5 cm deep cutting sternomastoid and injuring external and internal jugular vessels.

3. Incised wound 5 cm x 3 x 3 cm front of neck at the thyroid region injuring the tracheo larn geal junction and exposing trachea.

4. Incised wound 10 cm x 2 x 5 cm deep extending 2 cm below Lt.ear and running horizontally to the midline cutting both jugular vessals, sternomastoid on Lt. Side.

5. Incised wound 2 x 1 x 2 cm, in the midclavicular region on left side.

6. Incised wound 2 x 1 x 1 cm below the Lt. Clavicle in the 1st intercostal space 5 cm from the midline.

7. Incised wound 2 x 1 x 2 cm in the mid clavicular region on the Rt. Side in the supraclavicular fossa.

8. Incised wound 2 x 1 x 2cm in the first intercostal space on right side 6 cm from the midline.

9. Vertical incised wound medial side of sternum on Rt. Side 10 x 5 x 3 cm deep fracturing dislocating 4th, 5th and 6th sternocostal joints.

10. Horizontal incised wound below the right nipple 4 x 2 cm muscle deep.

11. Horizontal incised wound 5 x 2 cm muscle deep extending from xiphoid region to the left fracturing the xiphoid.

12. Skin abrasion 15 cm in horizontal direction on the left side of chest in the 6th intercostal space.

13. Incised wound 2 x 1cm muscle deep in the right upper arm 3 cm from oxial fold.

14. Contusion 5 x 2 cm in the right upper arm 2cm below injury No.13.

15. Skin abrasion horizontal in direction lateral side of Rt. upper arm.

16. Incised wound Rt. Palm 4 x 2 cm muscle deep between Rt. index and middle fingers cutting digital blood vessels.

17. Skin abrasion (Rt) knee.

18. Skin abrasion with contusion 3 x 2 cm middle of Rt. Leg.

19. Incised wound 3 x 2cm muscle deep in the middle line over abdomen 3 cm above the umbilicus.

20. Incised wound lateral side of Rt. Thigh 5 cm below the inguinal region horizontal in direction 17 cm x 6 cm x bone deep cutting the lateral side thigh muscles and blood vessels.

21. Contusion 9 x 2 cm in the right leg middle part.

22. Incised wound over left wrist 8 mm x 4 x 2 cm exposing the wrist joint fracturing and dislocating (Lt) wrist and injuring extensor tendons of (Lt) hand.

23. Incised wound 9 x 4 x 3cm deep, wound lateral side of (L) upper arm injuring the muscles and blood vessels in the upper 3rd horizontal in direction.

24. Incised wound 15 x 6 cm lateral side of (L) thigh, horizontal in direction and injuring the muscles, blood vessels, extending deep to femur.

25. Incised wound 7 x 3cm scapula deep in the upper part of scapula.

Internal appearance was noted as follows:

INTERNAL APPEARANCE: Skull - Crack fracture, (L) parietal bone with extradural, intradural H'mage, Brain congested. Thorax – Lungs pale, heart pale, chambers empty. Abdomen – stomach contained partly digested rice, liver, spleen, kidneys pale, intestine pale, urinary bladder empty.

He also deposed that death was caused due to haemorrhage and injury to the vital structures of the neck. Injury No.2 to 4 are fatal injuries. He further deposed that

> Injury No.9 is on the chest. That injury can be caused by cutting with an axe.
>
> Injury Nos.2 to 4 shows that the blood vessels to the brain were cut.
>
> Injury Nos.1 to 8, 10,11,13,16,19,23 to 25 can be caused by cutting with sword, knife and chopper.
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> (MO2 handed over to the witness) Injury Nos.1 to 8, 10 11, 13, 16, 19, 20, 22, 23, 24 and 25 could be caused by cuttings with this weapon.
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> Injury Nos.12,14,15,17,18 and 21 can be caused by hittings with iron rods like MO3 to 4 and with pestle like MO1 (MO1, 3 and 4 shown to the witness). The internal crack fracture of left parietal bone could be caused by beating with MO1.

He also deposed in cross examination that MO1 cannot cause injury No.1 but in rescanning, it is stated that if the blow by MO1 is followed by cut injuries by a sharp weapon it may occur. PW10 A.S.I recorded the F.I.Statement. PW12 was the first Investigating Officer. He deposed that he recovered the MO1, 5, 6 and 9 from the place of incident at the time of making seizure mahazer. He further deposed clearly regarding the recovery of MO2 to 4 on the basis of confession made by the accused and the details regarding investigation conducted by

him. He also deposed that the incident occurred within three months after his posting in Pattoor Police station as C.I. He was transferred on 10.11.1998 even though normally police officers are transferred only after three years. The question was put properly suggesting that he was urgently transferred by CPM Government as he started investigation properly and carried registration of F.I.R. Immediately and send the same to the Magistrate Court without delay and arrested the accused who were CPM workers. In any event, he deposed that in view of his transfer, he was not able to carry further questioning of witnesses. PW13 conducted further investigation and PW13 filed final report.

7. It was argued that non recording of the F.I.Statement when PWs.1 and 2 went to Police Station in searching of the vehicle to carry the injured to the hospital. Their immediate need was to get a vehicle at the earliest to take the injured to the hospital and not giving the F.I.Statement. But as soon as the injured was taken to the first hospital, PW1 returned and gave the F.I.Statement without delay even before she knew the death of the brother. Without any delay F.I.Statement was

given. It reached the court without any delay. Political murders took place in the area during that time due to clashes between RSS - BJP supporters on one side and CPI (M) marxists activists on the other side. People in the locality were also afraid to come and depose. Therefore non examination of CW13 or any other witness is of no serious consequence. PWs.1 and 2 saw the incident. PW1 witnessed the incident from the inception. Their evidence is corroborated by medical evidence, recovery evidence, deposition of PWs.3, 4 etc. Trial court convicted only A1 because his name was only mentioned in Ext.P1 and others were given the benefit of doubt. State did not file any appeal against the acquittal of others. The argument that injuries said to have been inflicted by A1 is not exactly tallying with the ante-mortem injuries described in the Post mortem examination is of no use. The Apex Court in ***Harshadsingh Pahelvansingh Thakore v. State of Gujarat ((1976) 4 SCC 640)*** observed as follows:

> "…. When a murderous assault by many hands with many knives has ended fataly, it is legally impermissible to dissect the serious ones from the others and seek to salvage those whose stabs have not proved fatal. When people play with knives and lives, the circumstances that one man's stab falls on a less or more vulnerable part

> of the person of the victim is of no consequence to fix the guilt for murder. Conjoint complicity is the inevitable inference when a gory group animated by lethal intent accomplish their purpose cumulatively. Section 34 IPC fixing constructive liability conclusively silences such a refined plea of extrication. (See: ***Amir Hussain v. State of U.P. ((1975) 4 SCC 247)*** and ***Maina Singh v. State of Rajashthan ((1976) 2 SCC 827)***. Lord Sumner's classic legal legal shorthand for constructive criminal liability, expressed in the Miltonic verse, 'they also serve who only stand and wait' a fortiori embraces cases of common intent instantly formed, triggering a plurality of persons into an adventure in criminality, some hitting, some missing, some splitting hostile heads, some splitting drops of blood. Guilt goes with community of intent coupled with participatory presence or operation. No finer juristic niceties can be pressed into service to nullify or jettison the plain punitive purpose of the Penal Code."
>
> (emphasis supplied)

In ***Masalti v. State of U.P. (AIR 1965 SC 202)*** it was observed by the Supreme Court as follows:

> "Then it is urged that the evidence given by the witnesses confirms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not well-founded. Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the

> common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault."

Number of injuries is not corroborating the number of assailants is not a material for convicting the identified assailant who was a member of the unlawful assembly. ***(See Bikau Pandey and others v. State of Bihar (AIR 2004 SC 997))***. Apex Court in ***Sumer v. State of U.P. ((2005) 7 SCC 220)*** held that when an accused is found to be a member of the unlawful assembly, question of attributing any role to him in the commission of murder is of no consequence. Here name of A1 was disclosed in the F.I.Statement given by PW1 immediately even before she came to know about the death of her brother. Her evidence is fully supported by PW2. They are natural witnesses and only witness to the incident. There is no reason to reject the testimony of PWs.1 and 2 on the ground that they are relatives. In ***Baburam v. State of M.P. ((2002) 10 SCC 35)***, the sole testimony of the wife of the deceased regarding the incident formed the basis for

conviction. There, the statement of the lady was recorded only two days after the incident and inspite of that the evidence being credit worthy was accepted and acted upon. Here, the statement of PW1 was recorded within two hours of the incident and there is no reason to think that within such time, she falsely implicated A1. In ***Dali P. Singh v. State of Punjab (AIR 1953 SC 364)*** it was observed as follows:

> "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such an enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person."

Here there is no material to doubt the evidence of PWs.1 and 2. It is very clear from the evidence that the first blow by A1 itself, injured fell down. It was followed by brutal attack by a group of people. We have already seen that by making a telephone call to deceased through the house of PW3 so that he would come out from his house in the night etc. clearly shows that murder was committed in a pre-planned manner by

a group of persons including A1 by brutally killing the deceased and inflicting several injuries.

Trial court has given valid reasons for convicting the appellant. We see no ground to interfere with the conviction and sentence passed by the trial court. Accordingly appeal is dismissed.

J.B.KOSHY, JUDGE

K.HEMA, JUDGE

prp

J.B.KOSHY & K.HEMA, JJ.

M.F.A.NO. OF 2006 ()

J U D G M E N T

1st December, 2007